



## INTRODUCTION

Following the resignation of Attorney General Jefferson B. Sessions III (“Mr. Sessions”), Deputy Attorney General Rod J. Rosenstein became the Acting Attorney General (“Acting Attorney General Rosenstein”) as a matter of law, with the attendant responsibility to enforce federal law, assume his role as Defendant in actions where Mr. Sessions was a Defendant in his official capacity, and oversee litigation, such as this action, as the chief officer of the U.S. Department of Justice.<sup>1</sup>

There are good reasons why the U.S. Constitution requires U.S. Senate confirmation of a U.S. Acting Attorney General, as explained in Plaintiffs’ Motion. Pl. Memo in Support of Motion (ECF No. 74-1), at 25. However, those reasons are well-demonstrated by the facts here. Rather than facing U.S. Senate confirmation, Matthew G. Whitaker (“Mr. Whitaker”) faces an active ethics complaint filed in Iowa alleging that he aided and abetted a fraudulent marketing scheme that cheated thousands of consumers, including military veterans, out of millions of dollars. *See*: Exhibit A. Moreover, more than 400 former Justice Department attorneys and staffers called for the removal of Mr. Whitaker as Acting Attorney General.<sup>2</sup> Further, Mr. Whitaker’s ethics review with the Department of Justice is not complete after 14 months.<sup>3</sup> Meanwhile, he is masquerading

---

<sup>1</sup> See: Jefferson B. Sessions, III, *Organizational Chart*, Department of Justice (Feb. 15, 2018), <https://www.justice.gov/agencies/chart>.

<sup>2</sup> Protect Democracy Press, *DOJ Alumni Statement Regarding the Appointment of Matthew Whitaker and the Rule of Law*, Medium (Dec. 4, 2018), “we are disturbed by the President’s appointment of Matthew Whitaker to serve as Acting Attorney General”), <https://medium.com/@protectdemocrac/doj-alumni-statement-regarding-matthew-whitaker-the-appointment-process-and-the-rule-of-law-446fff3c0f54>.

<sup>3</sup> On December 6, 2018, distinguished members of U.S House and the U.S. Senate made an inquiry to Lee J. Lofthus, Assistant Attorney General for Administration and Designated Agency Ethics

in this action, and across the country, in the capacity of the Acting Attorney General. To obscure that spectacle, Defendants characterize Plaintiffs' motion as a "meaningless sideshow," (Def. Response (ECF No. 75), at 1). There can be no sideshow, without a show. Here, Defendants' are producing a show starring Mr. Whitaker. Plaintiffs, who are not alone, simply do not want tickets to that show.

## ARGUMENT

### I. PLAINTIFFS' MOTION SEEKS RELIEF AND REMEDIES.

Defendants presumably argues that "[d]espite its title, [Plaintiffs'] motion does not actually seek any emergency relief or provisional remedies on behalf of any Plaintiff relating to any claim articulated in the Amended Complaint." Def. Response. (ECF No. 75), at 1.

Defendants misrepresent to the Court that Plaintiffs First Amended Complaint ("FAC") "does not contain a single allegation relating to [former Attorney General Jefferson Sessions ("Sessions")]."

(Def. Response. (ECF No. 75), at 2), theatrically dismissing one allegation as "irrelevant" and another as "meaningless."<sup>4</sup> Here, however, the FAC contains not zero, and not

---

Officer at the Department of Justice, proclaiming it "unacceptable" that Mr. Whitaker joined the Department 14 months ago, yet "his ethics review is still incomplete." [https://www.democrats.senate.gov/imo/media/doc/Letter20to20Lofthus\\_Whitaker20ethics\\_12.06.18.docx.pdf](https://www.democrats.senate.gov/imo/media/doc/Letter20to20Lofthus_Whitaker20ethics_12.06.18.docx.pdf).

<sup>4</sup> In previous cases, the Government's counsel, F. Franklin Amanat, has engaged in this exact modis operandi. On May 7, 2013, in a hearing before Honorable Judge Korman, in *Tummino v. Hamburg*, 12-cv-763, the court admonished counsel for behavior that increasingly appears to be taking place here. First, the court stated that Mr. Amanat was "making false statements" and "mischaracterizing" the facts of the case. Tr. at 16:14-19, 34:17. The court then found that Mr. Amanat was stating to the court that documents that were "confidential" were not confidential at all. Tr. at 19:9-16. The court then found that that Mr. Amanat was engaging in a "cover up" of the government behavior. *Id.* The court then recognized Mr. Amanat's pattern and practice of using less than credible "affidavits" to support his position. Tr. at 20:8-14. The court then found Mr. Amanat had "absolutely no credibility." Tr. at 20:22-25. The court stated that Mr. Amanat was

two, but allegations throughout as to the Attorney General and/or specifically Attorney General Jefferson Sessions, that are both relevant and meaningful to Defendants' refusal to issue immigrant visas to Plaintiff-Beneficiaries (emphasis added below):

***Defendant Jefferson Sessions*** (hereinafter "Defendant Sessions") is the Attorney General of the United States of America. The Attorney General is the chief lawyer of the United States government. The Immigration and Nationality Act charges the Attorney General with the administration and enforcement of the Act and all other laws related to immigration and naturalization of immigrants. Moreover, the Attorney General has control, direction, and supervision of all employees and all the files and records of USCIS. Defendant Sessions is being sued in his official and individual capacity. FAC ¶ 169.

***Defendants*** President Trump, Miller, Sullivan, Nielsen, Wray, and ***Sessions*** by agreeing to implement Presidential Proclamation 9645 whereby Plaintiff-Beneficiaries' previously approved immigrant visas were refused on the account of their national origin of Yemen and Islamic faith, conspired to deprive Plaintiff-Petitioners of the equal protection of the law and of equal privileges and immunities of the law of the United States. FAC ¶ 572.

President Trump's Presidential Proclamation 9645, which includes Yemen as one of the countries whose nationals are restricted from traveling to the United States, states "the Secretary of Homeland Security, in consultation with the Secretary of State, and the ***Attorney General***, has determined that a small number of countries...remain deficient at this time . . ." FAC ¶ 573.

***Defendant Sessions*** has been a vocal supporter of President Trump's efforts to bar Muslims from immigrating to the United States. FAC ¶ 584.

During an October 2015 radio interview with Stephen Bannon of Breitbart, ***Attorney General Sessions*** praised a 1924 law intended to end acceptance of all races into the United States saying that: "In seven years we'll have the highest percentage of Americans, non-native born, since the founding of the Republic. Some people think we've always had these numbers, and it's not so, it's very unusual, it's a radical change. When the numbers reached about this high in 1924, the president and congress changed the policy, and it slowed down immigration significantly, we then assimilated through the 1965 and created really the solid middle class of America, with assimilated immigrants, and it was good for America. We

---

"just playing games," and "basically lying" about the behavior of the government. The court concluded that Mr. Amanat was conducting the "charade" before the court in an effort "keep those documents secret." Tr. at 21:18; 26:2.

passed a law that went far beyond what anybody realized in 1965, and we're on a path to surge far past what the situation was in 1924.” FAC ¶ 585.

**Defendants** President Trump, Miller, Sullivan, Nielsen, Wray, and **Sessions** conspiracy to circumvent the immigration laws of the country and implement a discriminatory policy which denies immigrants entry into the United States based on their country of origin and religion violates Plaintiffs statutory and constitutionally protected rights to be free from discrimination on the account of his race and religion. FAC ¶ 587.

Given those ample and substantive allegations, Defendants nevertheless suggest, but do not motion,<sup>5</sup> that “the Court should dismiss the Attorney General from the case altogether.” (Def. Response. (ECF No. 75), at 2). Interesting. Defendants have filed two Motions to Dismiss this action, one on and a second on August 17, 2018 and November 2, 2018, and neither took issue with the Attorney General as a party. (ECF Nos. 65, 72). Rather, Defendants raise the issue now only to evade review of Mr. Whitaker’s unlawful appointment, which is done in concert with other like, and irrelevant, efforts at voluntary cessation discussed below.

## **II. DEFENDANTS’ COUNSEL LACKING THE AUTHORITY TO REPRESENT DEFENDANTS IMPACTS PLAINTIFFS’ SUBSTANTIVE RIGHTS.**

Defendants argue “the identity of the Government’s counsel or the manner in which the Attorney General supervises the Department’s litigation of this case [does not] ha[ve] any bearing on [Plaintiffs’] substantive rights.” Def. Response. (ECF No. 75), at 3.

Here, however, if Plaintiffs’ position on the merits of their motion is correct, then everything Mr. Whitaker does in this case as Acting Attorney General, including his representation of other Defendants, is *ultra vires*. See *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013),

---

<sup>5</sup> If Defendants’ untimely 11<sup>th</sup> hour rant that the Attorney General, and nearly all other Defendants, “should be dismissed from the case,” is viewed by the Court as a motion to dismiss them as parties, then Plaintiffs respectfully request time to oppose said implied motion in future briefing.

*aff'd*, 134 S. Ct. 2550 (2014) (because President did not legitimately appoint members to NLRB, Board did not have quorum and thus lacked authority to bind the parties). Defendants wish the Court to compel Plaintiffs to litigate against Mr. Whitaker, who Plaintiffs did not file suit against, who is not a successor to a Defendant who Plaintiffs did sue as his appointment violates 28 U.S.C. § 508, and also the Appointments Clause of the Constitution, and who does not have the authority to make litigation and policy decisions on behalf of other Defendants or to advise and represent other Defendants.

Here, Defendants' collective policies, formerly guided in part by Attorney General Jefferson Sessions, and allegedly and unlawfully guided by Mr. Whitaker, along with Defendants' failure to print Plaintiff-Beneficiaries' immigrant visas and wrongfully refusing their previously approved immigrant visas, continue to be violations of the APA, INA, and Plaintiffs' Due Process Rights. These violations cause Plaintiffs to suffer irreparable harm. Thus, Plaintiffs substantive rights are impacted by Mr. Whitaker's lack of authority, both as a Defendant, and as counsel for other Defendants.

### III. PLAINTIFFS' MOTION IS NOT NOW MOOT, NOR WILL IT BE.

Defendants argue that Plaintiffs' challenge to the legality of Mr. Whitaker's appointment "will *likely soon become* moot, as the President recently announced plans to nominate William P. Barr ("Mr. Barr") to be Attorney General." Def. Response. (ECF No. 75), at 3-4, (emphasis added). Multiple fatal flaws, this argument suffers.

Factually, Defendant President Donald J. Trump ("Defendant Trump") has not yet nominated Mr. Barr, and even if he had, under the Appointments Clause of the United States Constitution, the officeholder is nominated by the President of the United States "*and appointed with the advice and consent of the United States Senate*." U.S.C.A. Const. Art. 2, § 2, cl. 2, (emphasis added). Defendants' counsel omits to mention that Defendants here do not even have

the power and authority, on their own, to make the matter moot by effectuating the promised change of circumstances.

Further, mootness has two exceptions which apply here. First, “[i]t is well settled that ‘a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000)(quoting *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)). In *Friends of the Earth, Inc.*, the Supreme Court held that an industrial polluter, against whom various deterrent civil penalties were being pursued, could not claim that the case was moot, even though the polluter had ceased polluting and had closed the factory responsible for the pollution. In another exception, a case is not moot when it presented an issue that was “capable of repetition, but evading review.” *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911).

Here, like in *Friends of the Earth, Inc.*, Defendant Trump’s unlawful appointment of Mr. Whitaker would still have been unlawful, even if he replaced Mr. Whitaker. The hypothetical appointment of Mr. Barr is a voluntary cessation of the issue presented, possibly motivated by multiple legal challenges to Mr. Whitaker’s appointment that continue to mount.<sup>6</sup> Further, like in

---

<sup>6</sup> See *Michaels v. Whitaker*, Mot. to Substitute, No. 18-496 (U.S. Nov. 16, 2018) (arguing that Whitaker’s purported appointment is unconstitutional); *Blumenthal v. Whitaker*, Compl., 18- cv- 2664 (D.D.C. Nov. 19, 2018) (same); *Maryland v. U.S.*, Mot. to Substitute, No. 18-02849 (D. Md. Nov. 13, 2018)(arguing for a preliminary injunction against Mr. Whitaker’s substitution for Jefferson Sessions, and a substitution of Rod Rosenstein as Acting Attorney General); *O.A. v. Trump*, Mot. for temporary restraining order and preliminary injunction, No. 18-02718 (D.D.C. November 21, 2018); *U.S. v. Hanig*, Mot. to Dismiss Indictment, or in the Alternative to Disqualify Prosecution Team (E.D. Mo. November 13, 2018); *Rojo-Ramirez v. Trump* (U.S. District Court for the District of Colorado, 18-cv-03125); *Matter Of Negusie*, Brief of Amici Curiae The American Immigration Council, Asista Immigration Assistance, Harvard Immigration And Refugee Clinical Program, Her Justice, Immigrant Defense Project, Northwest Immigrant Rights Project, And Southern Poverty Law Center On Referral To The Attorney General, Referred from: United States Department of Justice Executive Office for Immigration Review Board of

*Southern Pacific Terminal Co.*, Defendant Trump has demonstrated that unpredictability,<sup>7</sup> and high turnover,<sup>8</sup> characterize his administration. Those characteristics make it even more plausible that the unlawful appointment of Mr. Whitaker will be followed in short order by future non-Senate-confirmed Acting Attorney Generals. When challenges to those future non-Senate-confirmed Acting Attorney Generals are lodged, rest assured the Defendants will argue, again, that their subsequent replacements make their unlawful appointments moot.

Thus, Plaintiffs' motion is not moot, but even when Mr. Barr or any other nominee replaces Mr. Whitaker, the issue is nevertheless not moot.

#### IV. DEFENDANTS' RESPONSE WAS DEFENDANTS' RESPONSE.

Finally, Plaintiffs do not consent to Defendants' suggestion that they be allowed "until January 18, 2019, to submit a full brief in response to Plaintiffs' motion." Def. Response. (ECF

---

Immigration Appeals Interim Decision #3943 27 I&N Dec. 481 (A.G. 2018); *In re Appointment of Thomas C. Goldstein as Amicus Curiae Pursuant to 50 U.S.C. § 1803(i)(2)(B)*, Case No. 18-04, Mot. of Thomas C. Goldstein For Appointment as Amicus Curiae and for Lea Ve to File Amicus Curiae Brief (U.S. Foreign Intelligence Surveillance Court, Wash. D.C. Dec. 11, 2018).

<sup>7</sup> Top aides to Defendant President Trump are reportedly now floating Mr. Whitaker, despite outstanding ethics issues, to become the next White House Chief of Staff, a role that would require U.S. Senate confirmation. See: Robert Costa and Josh Dawsey, *Trump turns down Meadows for White House chief of staff, removing leading contender*, Wash Post (Dec. 12, 2018), [https://www.washingtonpost.com/politics/trump-tells-meadows-no-on-white-house-chief-of-staff-wants-him-on-capitol-hill/2018/12/12/3148be46-fe57-11e8-83c0-b06139e540e5\\_story.html](https://www.washingtonpost.com/politics/trump-tells-meadows-no-on-white-house-chief-of-staff-wants-him-on-capitol-hill/2018/12/12/3148be46-fe57-11e8-83c0-b06139e540e5_story.html).

<sup>8</sup> Denie Lu, and Karen Yourish, *You're Hired! You're Fired! Yes, the Turnover at the Top of the Trump Administration Is ... "Unprecedented."*, New York Times (Dec. 10, 2018), ("The flurry of changes at the White House and cabinet level is 'unprecedented,' according to Max Stier, the president and chief executive of the Partnership for Public Service, a nonprofit organization that specializes in federal government management issues"), <https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html>.

No. 75), at 4. Defendants had ample time to respond, and they responded. In motion practice, there are no second bites at the apple. You only get once response.

Further, and as noted in Plaintiffs' noted before in their memorandum in support of the motion, Defendants have been researching the legal problems with Mr. Whitaker's appointment since even before Mr. Whitaker was appointed.<sup>9</sup> On November 16, 2018, according to a credible news report, a notice was posted on an internal Justice Department message board that stated: "Multiple US Attorney Offices have received motions to dismiss cases based on an allegation that the Acting Attorney General's appointment is invalid. The Criminal and Civil Divisions are working on model briefing in response. Please standby for that briefing, which will help ensure consistent responses."<sup>10</sup> Thus, Defendants have not only effectively had four weeks to prepare their reply to Plaintiffs' motion, **they have been preparing**. Simply, Defendants' response was Defendants' response, and no good cause was put forth to warrant the Court to allow a further delay in the adjudication of this important issue.

## CONCLUSION

For the foregoing reasons, and reasons outlined in Plaintiffs' Memorandum in Support of Motion (ECF No. 74-1), Plaintiffs' motion for either a preliminary injunction or substitution of Acting Attorney General Rosenstein as the Acting Attorney General in this matter should be granted.

---

<sup>9</sup> Memorandum for Emmet T. Flood, Counsel to the President, Op. O.L.C., 2018 WL 6131923, (Nov. 14, 2018), <https://assets.documentcloud.org/documents/5113255/Acting-AG-Op.pdf>.

<sup>10</sup> Chris Geidner, *The White House Won't Say When Trump Formally Named Matthew Whitaker As Acting Attorney General*, BuzzFeed News (November 20, 2018), <https://www.buzzfeednews.com/article/chrisgeidner/trump-whitaker-appointment-attorney-general>.

Dated: December 13, 2018  
Bronx, New York

Respectfully submitted,

/s/ Julie Goldberg, Esq.  
JULIE GOLDBERG, ESQ.  
GOLDBERG AND ASSOCIATES  
5586 Broadway  
Third Floor  
Bronx, New York 10463  
Tel: (718) 432-1022  
Fax: (718) 432-1044  
Email: [uscis@goldbergimmigration.com](mailto:uscis@goldbergimmigration.com)

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the date indicated below, I caused service of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION, AND TO SUBSTITUTE DEFENDANT via CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 13<sup>th</sup> day of December, 2018, at Bronx, New York:

By: /s/ Julie Goldberg, Esq  
Julie Goldberg, Esq.  
GOLDBERG & ASSOCIATES  
5586 Broadway Ave  
Third Floor  
Bronx, NY 10463  
Telephone: (718) 432-1022  
Facsimile: (718) 432-1044  
Email: USCIS@goldbergimmigration.com